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In the Supreme Court of the United States

OCTOBER TERM, 1935

No. 301

ED BROWN, HENRY SHIELDS and YANK ELLINGTON, Petitioners,

versus

STATE OF MISSISSIPPI

STATEMENT AND BRIEF FOR PETITIONERS

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INDEX

SUBJECT INDEX

	Page
Statement and brief for Petitioners	5
B. Reference to Opinions	5
C. Statement of Jurisdiction	6
D. Summary Statement of the Matters Involved	8
E. Specification of Errors	13
Argument	14
Point I—By the knowing use on the part of the state, as confessions, of statements illegally obtained from petitioners, through force and violence, petitioners were denied due process of law	15
Point II—Petitioners were denied due process of law through denial of Counsel	23
Point III—Petitioners were denied due process of law in that the trial court possessed no jurisdiction to enter judgment	25
Point IV—Petitioners were denied due process of law in that they were denied equal protection of the law	30
Point V—The decision of the Supreme Court of Mississippi is itself a denial of due process of law	33
Conclusion	37

TABLE OF AUTHORITIES

Page

Atchison, etc. R. Co. v. Harold, 241 U. S. 371, 36 Sup. Ct. Rep. 665, 60 L. Ed. 1050 7

Banks v. State, 93 Miss. 700, 47 So. 437 20

Brown et al. v. State, ... Miss. ....., 158 So. 343 ..... 15, 16, 18

Chicago B. & Q. R. R. Co. v. Chicago, 166 U. S. 226, 41 L. Ed. 979, 17 Sup. Ct. Rep. 581 22

Cofer v. State, 152 Miss. 761, 118 So. 613 22

Consolidated Turnpike Co. v. Norfolk, etc. R. Co. 228 U. S. 326, 57 L. Ed. 857, 33 Sup. Ct. Rep. 510 7

Coppell v. Hall, 7 Wall. 542, 19 U. S. (L. Ed.) 244 36

Duncan v. Missouri, 152 U. S. 382 31

Ellis v. State, 65 Miss. 44, 3 So. 188 20

Ex parte Commonwealth of Va., 100 U. S. 339, 25 L. Ed. 676 21

Fisher v. State, 145 Miss. 116, 110 So. 361 20

Great Northern Ry. Co. v. Sunburst Oil and Refining Co., 287 U. S. 358, 77 L. Ed. 360, 53 Sup. Ct. Rep. 145 7

In Re Bonner, 151 U. S. 242, 38 L. Ed. 149 27

In re Nielsen, 131 U. S. 176, 33 L. Ed. 118 ..... 26, 36

Johnson v. State, 107 Miss. 196, 65 So. 218 20

Klatsky v. Hatch, 157 N. Y. S. 878 37

Mackmasters v. State, 82 Miss. 459, 34 So. 156 20

Page

Mallett v. North Carolina, 181 U. S. 589, 45 L. Ed. 1015, 21 Sup. Ct. Rep. 730 8

McRae v. State, 8 Okla. Cr. 483 27

Mooney v. Holohan, ... U. S. ..... ,79 L. Ed. 347 ..... 20, 21, 36

Motor Contract Co. v. Van Der Volgen, 162 Wash. 449, 298 Pac. 705, 79 A. L. R. 29 36

Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567 22

Nickey v. State of Mississippi, 292 U. S. 393, 78 L. Ed. 1323, 54 Sup. Ct. Rep. 743 7

People v. Winchester, 352 Ill. 237, 245, 185 N. E. 580 25

Powell v. Alabama, 287 U. S. 45, 77 L. Ed. 158, 53 Sup. Ct. Rep. 55 ..... 23, 24, 25, 26

San Jose Land Co., etc. v. San Jose Ranch Co., 189 U. S. 177, 47 L. Ed. 765, 23 Sup. Ct. Rep. 481 7

Scott v. McNeal, 154 U. S. 34, 38 L. Ed. 896 22

Simmons v. State, 61 Miss. 243 19

Snyder v. Massachusetts, 291 U. S. 97, 78 L. Ed. 674, 54 Sup. Ct. Rep. 330 33

State v. Guerringer, 265 Mo. 408, 178 S. W. 65 ..... 32, 33

Twining v. New Jersey, 211 U. S. 78, 53 L. Ed. 97, 29 Sup. Ct. Rep. 14 28

Weeks v. United States, 232 U. S. 383, 58 L. Ed. 652 22

Page

Whip v. State, 143 Miss. 757, 109 So. 697 20

Whitley v. State, 78 Miss. 255, 28 So. 852 20

Yick Wo v. Hopkins, 118 U. S. 356, 30 L. Ed. 220 31

STATUTES CITED

Constitution of State of Mississippi, Section 26 15

Constitution of the United States, Fourteenth Amendment 6, 13, 37

Statutes at Large, 43, page 937, Sec. 344 U. S. C. A., Title 28 6

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B.

REFERENCE TO OPINIONS, SUPREME COURT OF THE STATE OF MISSISSIPPI

The majority opinion of the Supreme Court of Mississippi, (R. 127) ..... Miss....., 158 So. 339, was rendered January 7, 1935.

The dissenting opinion, by Justice Anderson, of the Supreme Court of Mississippi, (R. 135)..... Miss....., 158 So. 343, was rendered January 7, 1935.

The majority opinion of the Supreme Court of Mississippi, on Suggestion of Error, (R. 166)..... Miss....., 161 So. 465, was rendered April 29, 1935.

The dissenting opinion on Suggestion of Error, delivered by Justice Griffith, Anderson, J., concurring (R. 173)..... Miss....., 161 So. 470, was rendered April 29, 1935.

C.

STATEMENT OF JURISDICTION.

1. The date of the judgment to be reviewed is April 29, 1935. (R. 179).

2. The statutory provision which is believed to sustain the jurisdiction of this Court is Section 237 of the Judicial Code, as amended by Act of February 13, 1925; 43 Statutes at Large 937, Section 344 U. S. C. A., Title 28.

3. In their Suggestion of Error, filed in the Supreme Court of the State of Mississippi (R. 138), petitioners specially set up and claimed rights and privileges accorded to them under the Constitution of the United States, said rights and privileges being in relation to due process of law, within the meaning of the Fourteenth Amendment to the Federal Constitution.

Petitioners asserted, in said Suggestion of Error, as they now represent to this Honorable Court, that their Constitutional right to due process of law, in their trial for murder, by the Circuit Court of Kemper County, Miss., and on appeal to the Supreme Court of Mississippi, had been violated by the State of Mississippi in the following particulars:

(a) By the knowing use, on the part of the State, as confessions, of statements illegally obtained from petitioners, through force and violence, by officers of the State. (R. 139, 140.)

(b) By the denial to petitioners, in reality, of representation by counsel. (R. 140.)

(c) By the judgment of the trial court, and its affirmance by the Supreme Court of Mississippi, in that the trial court had lost jurisdiction to enter said judgment, because of the denial of due process of law to petitioners, in the trial of said cause. (R. 140.)

4. In its Opinion on Suggestion of Error (R. 166), dissented to by Justices Griffith and Anderson (R. 173), the Supreme Court of the State of Mississippi considered the Federal questions therein raised and overruled same, thereby establishing and confirming the jurisdiction of this Honorable Court to review the proceedings herein, and the judgment and opinions of the Supreme Court of Mississippi, insofar as same relate to a denial of due process of law, to petitioners, within the meaning of the Fourteenth Amendment to the Federal Constitution.

The following authorities are in point as to the jurisdiction of this Honorable Court to review the Federal questions raised herein:

Great Northern Ry. Company v. Sunburst Oil and Refining Company, 53 Sup. Ct. Rep. 145, 287 U. S. 358, 77 L. Ed. 360;

Nickey v. State of Mississippi, 54 Sup. Ct. Rep. 743, 78 L. Ed. 1323, 292 U. S. 393;

Consolidated Turnpike Co. v. Norfolk, etc., R. Co., 228 U. S. 326, 33 Sup. Ct. Rep. 510, 57 L. Ed. 857;

Atchison, etc. R. Co. v. Harold, 241 U. S. 371, 36 Sup. Ct. Rep. 665, 60 L. Ed. 1050;

San Jose Land, etc. Co. v. San Jose Ranch Co., 23 Sup. Ct. Rep. 487, 189 U. S. 177, 180, 47 L. Ed. 765;

Mallet v. North Carolina, 181 U. S. 589, 21 Sup. Ct. Rep. 730, 45 L. Ed. 1015.

5. Further, there is no State question sufficient to support the decision of the Court, to the exclusion of the Federal question involved.

D.

SUMMARY STATEMENT OF THE MATTERS INVOLVED.

The question involved in this cause is whether petitioners received the benefit of due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States, in their trial for murder, in the Circuit Court of Kemper County, Miss., and on their appeal to the Supreme Court of the State of Mississippi, from the judgment of said court, and sentence of death imposed therein.

Final judgment has now been entered against these petitioners by the Supreme Court of the State of Mississippi, the court of last resort in this state.

Petitioners, three ignorant negroes, (R. 126, 39, 51, 112) were indicted Wednesday, April 4, 1934, (R. 1) at an extension of the March term of the Circuit Court of Kemper County, Mississippi, (R. 164) for the murder of a white planter, (R. 77, 66, 67) Raymond Stewart, whose death occurred, (R. 8, 11) in said county on Friday of the week previous. (R. 6, 10.)

On a date not directly disclosed by the record, but, presumably, immediately following indictment, petitioners were arraigned, pled "Not Guilty" (R. 2) and

counsel was appointed by the court to defend them. (R. 54). On the next day after indictment, April 5, 1934, petitioners were put on trial for their lives. (R. 3).

On said trial the state based its charge of murder on alleged confessions, which it offered as freely and voluntarily made by petitioners, (R. 25, 35, 37, 39), while confined in the Meridian (Lauderdale County) jail, (R. 25, 34, 38) for safe-keeping. (R. 23, 70).

At the request of petitioners' counsel a preliminary examination was had of Sheriff Adcock (R. 20) the first witness by whom the state sought to prove the confessions, to determine whether the confessions were free and voluntary. Said examination revealed that during the early part of the questioning petitioners held back, and refused to make a complete statement, (R. 23), but under pressure began to talk (R. 23-24) and were then constantly corrected by Adcock when their statements met with his disapproval. (R. 23-24.) The sheriff admitted hearing of a prior confession (R. 24) and that at this time one of the petitioners bore marks of physical mistreatment, which the negro informed him was the result of whippings (R. 24), but that he was not advised and did not inquire concerning the details. (R. 24.)

Petitioners' objection to the introduction of the purported confessions was thereupon overruled (R. 25) and the testimony of Sheriff Adcock, and others who were with him at the time of said statements, was then admitted over repeated objections (R. 25, 35, 41), after which the state rested its case. (R. 41).

Whereupon petitioners, in their own defense, testified that the alleged confessions were false (R. 43, 59, 66, 71) and procured by officers of the state, and others, by force and violence, enroute to, and in the Meridian jail. (R. 43, 58, 59, 71.) That they denied guilt until cruelly beaten (R. 43, 59, 70, 71) and threatened with death (R. 47) if necessary to coerce a confession; and that they were threatened with further punishment if they changed their story. (R. 60, 61, 55, 72).

That on the night following the whippings the petitioners were subjected to questioning by Sheriff Adcock of Kemper County and Sheriff Stevens of Lauderdale County, and certain other officers and persons, (R. 43, 59, 71) and that they repeated the stories they were forced to make under the lash because of fear of further punishment. (R. 60, 61, 55, 72).

The record shows that during the trial the scars and wounds of petitioners were plainly visible, and that the attention of the court and jury was directed thereto. (R. 43, 69, 72).

The state offered in rebuttal the testimony of a deputy sheriff, and certain others, who admitted that the negroes denied guilt until whipped. (R. 102, 106, 112, 113, 114).

An examination of the record will disclose that the only evidence of consequence, against petitioners, was the so-called "confessions." (See opinions, R. 135, 175-176).

After hearing the evidence, argument of counsel, and instructions of the court, the jury returned a verdict

of "Guilty" as to each of the petitioners; (R. 2-3) whereupon the court entered its judgment, and sentenced petitioners to be hung by the neck until dead. (R. 3).

From this judgment petitioners appealed to the Supreme Court of Mississippi (R. 125) assigning as the principal ground of error the admission of said incriminating statements, as purported confessions. (R. 127)

The Supreme Court affirmed the judgment of the lower court in the decision rendered by it on appeal, (R. 127), and entered its judgment, (R. 137) resetting the date for execution, a dissenting opinion being delivered by Justice Anderson. (R. 135).

Petitioners thereupon filed in the Supreme Court of Mississippi their Suggestion of Error, (R. 138), said Suggestion asserting the Federal questions with reference to denial of due process of law, in that they were convicted by the fraud of the State through its agents, they were denied counsel, the trial court possessed no jurisdiction to enter judgment, and they were denied equal protection of the laws contrary to the Fourteenth Amendment to the Constitution of the United States.

As an accompaniment to the Suggestion of Error, a Motion in Arrest of Judgment, and For a New Trial was filed; (R. 141) said Motion being filed in the appellate court, as stated therein, under the theory that no opportunity had been afforded in the lower court for filing same. Said Motion was supported by affidavits of petitioners (R. 149, 153, 157) and counsel (R. 146) appointed by the lower court to represent them in the trial; said affidavits setting forth the manner in which the alleged

confessions were coerced, and the further facts that counsel had no access to petitioners for sufficient time to allow preparation of the case, or to acquaint counsel with the facts.

The Suggestion of Error was overruled by the Court, and final judgment entered (R. 179). In its opinion on said Suggestion of Error, (R. 166) the court held, in regard to the Federal questions raised by petitioners, that immunity from self-incrimination is not essential to due process of law, within the meaning of the 14th Amendment to the Federal Constitution; and that failure to exclude confessions which were competent when admitted, after introduction of evidence tending to show their incompetence; in absence of request so to do, does not deny due process of law, within the meaning of the 14th Amendment to the Federal Constitution.

The court further held that the record does not disclose that counsel appointed by the court consciously failed to discharge any duty they owed appellants; and the court declined to consider the Motion in Arrest of Judgment and For New Trial, on the ground that said Motion would not lie in the Supreme Court, same being a court of appellate jurisdiction only.

A dissenting opinion was delivered by Justice Griffith, concurred in by Justice Anderson. (R. 173).

In its final judgment, the Supreme Court reset the date of execution of petitioners for June 6, 1935. (R. 179).

Pursuant to Petition for Stay of Execution, (R. 179) the Supreme Court of Mississippi entered its order

(R. 180) staying the execution of petitioners for a sufficient time to allow the presentation to this Honorable Court of Petition for Certiorari.

This Court granted petitioners' application for Writ of Certiorari, —— U. S. ——, October 14, 1935.

E.

SPECIFICATION OF ERRORS

1. The Supreme Court of the State of Mississippi erred in affirming the judgment of the trial court, and in entering its judgment herein, in that the State of Mississippi contrived the conviction of petitioners, in the trial court, by the knowing use, on the part of the State, as confessions, of statements illegally obtained from petitioners, through force and violence, by officers of the State; such use amounting to a denial of due process of law, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

2. The Supreme Court of the State of Mississippi erred in affirming the judgment of the trial court, and in entering its judgment herein, in that petitioners were, in reality, denied representation by counsel, in the trial court, and hence were denied due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States.

3. The Supreme Court of the State of Mississippi erred in affirming the judgment of the trial court, and in entering its judgment herein, in that the trial court had lost jurisdiction to enter said judgment, in the trial of said cause, because of the denial of due process of law

to petitioners, within the meaning of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of the State of Mississippi erred in refusing to consider Motion in Arrest of Judgment, and for New Trial, filed therein, and in affirming the judgment of the lower court, in that no opportunity was afforded petitioners for filing said Motion in the lower court; thereby denying to petitioners due process of law, as provided by the Fourteenth Amendment to the Federal Constitution, in that they were denied equal protection of the law.

5. The Supreme Court of the State of Mississippi erred in entering its judgment herein, and in its decision of said cause, in that said decision and judgment are, within themselves, denials of due process of law, within the meaning of the Fourteenth Amendment to the Federal Constitution, in that through them the court denies to petitioners their fundamental rights.

ARGUMENT

The learned counsel for respondent had much to say in his brief opposing the petition for a writ of certiorari regarding the Motion in Arrest of Judgment and for a New Trial and the affidavits in support thereof filed herein. Especially did counsel object to the facts stated in the supporting affidavits contending that they were not properly a part of the record.

Therefore, the allegations contained in the aforementioned Motion and affidavits are omitted from the

statement of facts and argument herein, with the exception of Point IV which treats particularly with the denial of due process in regard to the said Motion.

POINT I

BY THE KNOWING USE ON THE PART OF THE STATE, AS CONFESSIONS, OF STATEMENTS ILLEGALLY OBTAINED FROM PETITIONERS, THROUGH FORCE AND VIOLENCE, PETITIONERS WERE DENIED DUE PROCESS OF LAW.

For the convenience of the Court, we quote the pertinent portion of Section 26 of the Mississippi Constitution:

> "In all criminal prosecutions the accused***** shall not be compelled to give evidence against himself; ****"

THE CHARGE OF MURDER WAS BASED ON AND SUPPORTED ONLY BY THE SO-CALLED CONFESSIONS. From a study of the record herein, it is readily seen that there is no evidence whatsoever to support a conviction, save the extorted confessions.

In this connection Justice Anderson in his dissenting opinion, *Brown et al vs. State,* ——Miss.——, 158 So. 343, said:

> "Leaving out the confessions, the evidence was wholly insufficient to sustain the conviction." (R. 135).

And again in the same opinion Justice Anderson said on this point:

> "Wipe out these confessions, and the court would have been forced to direct a verdict of not guilty. The court had staring it in the face this incompetent testimony without which there could be no conviction." (R. 136).

Justice Griffith said in this regard in his dissenting opinion, *Brown et al vs. State,* ——Miss.——, 161 So. 470:

> "The evidence upon which the conviction was obtained was the so-called confessions. Without this evidence a peremptory instruction to find for the defendants would have been inescapable." (R. 175-176).

THERE IS NO DOUBT BUT THAT THE SO-CALLED CONFESSIONS WERE OBTAINED BY FORCE AND VIOLENCE. In the trial court each of the petitioners testified that they steadfastly denied guilt until severely beaten.

Ed Brown, one of the petitioners, testified as follows: (R. 43).

> "Q. You heard Mr. Adcock and the sheriff of Lauderdale County, Mr. Stevens, and Preacher Stevens testify about the confession you made in Meridian in the jail, saying that you participated in this killing; tell the jury whether or not you told the truth at that time.
>
> A. No, sir I didn't tell the truth.

Q. Why did you tell something that was not true?

A. Mr. Cliff called me out of the jail Sunday evening—

Q. Who did?

A. Mr. Cliff Dial. He told me to come on out here, that he had heard I told that I killed Mr. Raymond. I come out of the jail house and I said: "I declare I didn't kill Mr. Raymond." He said: "Come on in here and pull your clothes off; I am going to get you." I said to the last that I didn't kill him. There was two more fellows about like that there, and they was whipping me. They had me benind across chairs kind of like that. I said I didn't kill him, and they said put it on him again, and they hit so I had to say: "Yes, sir." Mr. Cliff said: "Give it to me, and I will get it." He took it, and it had two buckles on the end. They stripped me naked and bent me over a chair, and I just had to say it; I couldn't help it."

The testimony of Henry Shields and Yank Ellington, the other two petitioners, was very similar in this regard (R. 59, 69-70).

Certain peace officers corroborated the statements made by the petitioners when they were put on the stand in rebuttal by the State. Mr. T. H. Nicholson, Marshal of the town of Scooba (R. 99) testified as follows: (R. 102).

"Q. Each of these three defendants had been beaten before the questions were propounded?

A. I don't know anything about Ellington. I hadn't seen him at the time.

Q. The defendants Ed Brown and Henry Shields had been whipped before the statements were obtained?

A. They had been whipped some, yes, sir."

Cliff Dial, a Deputy Sheriff, testified as follows: (R. 113).

"Q. Ed denied it at first, didn't he?

A. Yes, sir.

Q. He said he wasn't guilty?

A. Yes, sir.

Q. Shields denied it too?

A. Yes, sir, at first.

Q. What did you do to them then?

A. We kind of warmed them a little—not too much.

Q. They said then that they were guilty?

A. Yes, sir."

Chief Justice Smith, in his opinion overruling the Suggestion of Error, *Brown et al vs. State, supra,* said: (R. 173)

"Nothing herein said is intended to even remotely sanction the method by which these confessions were obtained."

Justice Griffith in his dissenting opinion, *Brown, et al vs. State, supra,* said: (R. 176)

"The defendants were put on the stand, and by their testimony the facts and the details thereof as to the manner by which the confessions were extorted from them were fully developed, and it is further disclosed by the record that the same deputy, Dial, under whose guiding hand and active participation the tortures to coerce the confessions were administered, was actively in the performance of the supposed duties of a court deputy in the courthouse and in the presence of the prisoners during what is denominated, in complimentary terms, the trial of these defendants. This deputy was put on the stand by the state in rebuttal, and admitted the whippings. It is interesting to note that in his testimony with reference to the whipping of the defendant Ellington, and in response to the inquiry as to how severely he was whipped, the deputy stated, 'Not too much for a negro; not as much as I would have done if it were left to me.' Two others who had participated in these whippings were introduced and admitted it —not a single witness was introduced who denied it. *The facts are not only undisputed, they are admitted—and admitted to have been done by officers of the state,* in conjunction with other participants, and all this was definitely well known to everybody connected with the trial, and during the trial, including the State's prosecuting attorney and the trial judge presiding." (Italics ours).

These extorted statements which have been heretofore referred to as confessions are condemned by the Constitution and laws of Mississippi. Simmons v. State,

61 Miss. 243; Ellis v. State, 65 Miss. 44, 3 So. 188; Whitley v. State, 78 Miss. 255; 28 So. 852; Mackmaster v. State, 82 Miss. 459, 34 So. 156; Banks v. State, 93 Miss. 700, 47 So. 437; Johnson v. State, 107 Miss. 196, 65 So. 218; Whip v. State, 143 Miss. 757, 109 So. 697; Fisher v. State, 145 Miss. 116, 110 So. 361.

THIS ACTION ON THE PART OF AGENTS OF THE STATE IN SECURING AND USING THESE EXTORTED STATEMENTS WAS A DENIAL OF DUE PROCESS. It should be borne in mind that these alleged confessions were procured by men who are supposed to be peace officers and agents of the State and then were used by officers of the State to secure a conviction of petitioners.

This action on the part of the State constituted a double fraud. Not only did if offer illegal evidence in view of Section 26 of the Constitution of the State of Mississippi; but by introducing these statements obtained under duress, the State of Mississippi offered evidence essentially false and tainted further by the criminal manner in which the statements were secured.

This Court has repeatedly held that due process of law is denied by a state when prevented through the wrong of its officers and agents. The following language, in the case of *Mooney v. Holohan*, —— U. S.——, 79 L. Ed. 347, is peculiarly applicable:

> "It (due process of law) is a requirement that cannot be satisfied by mere notice and hearing if a State has contrived a conviction through the pretence of a trial which in truth is but used as a means

of depriving a defendant of liberty through a deliberate deception of court and jury by the presentation of testimony known to be perjured. Such a contrivance by a State to procure the conviction and imprisonment of a defendant is as inconsistent with the rudimentary demands of justice as is the obtaining of a like result by intimidation. And the action of prosecuting officers on behalf of the State, like that of administrative officers in the execution of the laws, may constitute state action within the purview of the Fourteenth Amendment."

On the ground of fraud, there is very little to choose between the act of the State, referred to in *Mooney v. Holohan, supra,* and the act of the State in the present case. The State of Mississippi, through its use, as confessions, of statements literally whipped, word for word, from petitioners, presented evidence a sfalse as perjury. The fraud in the two cases, as to the introduction of false testimony, is essentially the same.

In the instant case, however, the fraud of the State is aggravated by the infamous mistreatment, on the part of the State, which resulted in the alleged confessions.

In this connection this Court, in the case of *Ex Parte, Commonwealth of Virginia,* 100 U. S. 339, 25 L. Ed. 667, used the following language:

"We have said the prohibitions of the 14th Amendment are addressed to the State. They are: 'No State shall make or enforce a law which shall abridge the privileges or immunities of citizens of

the United States, * * * nor deny to any person within its jurisdiction the equal protection of the laws.' They have reference to actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive or its judicial authorities. It can act in no other way. The constitutional provision therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a state government, deprives another of property, life or liberty without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's power, his act is that of the State. This must be so, or the constitutional prohibition has no meaning. Then the State has clothed one of its agents with power to annul or to evade it."

See also in this connection, Neal v. Delaware, 103 U. S. 370, 26 L. Ed. 567; Scott v. McNeal, 154 U. S. 34, 38 L. Ed. 896; Chicago B. & Q. R. R., 166 U. S. 226, 41 L. Ed. 979.

The following language in the case of *Weeks v. United States,* 232 U. S. 383, 58 L. Ed. 652 was quoted in the case of Cofer v. State, 152 Miss. 761, 118 So. 613:

"The tendency of those who execute the criminal laws of the country to obtain conviction by

means of unlawful seizures and enforced confessions * * * should find no sanction in the judgments of the courts which are charged at all times with the support of the Constitution and to which people of all conditions have a right to appeal for the maintenance of such fundamental rights."

We therefore submit that petitioners were denied due process of law by the fraud of the State in the securing and using of these enforced confessions.

POINT II.

PETITIONERS WERE DENIED DUE PROCESS OF LAW THROUGH DENIAL OF COUNSEL.

The right to a hearing as a basic element of due process has repeatedly been construed to include the right to the aid of counsel. This Court ruled very positively on this subject in the recent case of *Powell v. Alabama,* 287 U. S. 45, 77 L. Ed. 158. The right to aid of counsel has been repeatedly held to be no mere form or ceremony, but a substantial right, and thus a Court is bound to make an effective appointment of counsel, taking into consideration all of the circumstances.

In the instant case the record discloses the following facts in connection with the appointment of counsel and the necessity for same: That petitioners are ignorant pauper negroes (R. 126, 39, 51, 112). On April 4, 1934 they were indicted for murder. (R. 1). On April 5, 1934 they were put to trial for their lives (R. 3). On a date not directly disclosed by the record, but necessarily

in the interval of time between the indictment and trial. Petitioners were arraigned and counsel appointed by the Court to defend them. (R. 2, 50, 54).

In order to satisfy the requirement of due process of law, in view of the fact that these negroes are ignorant paupers, the trial court was under a positive duty of appointing them counsel at a time and under circumstances which would, in fact, allow the defense adequate preparation. This the Court did not do. It is apparent that counsel for petitioners had no real opportunity to prepare themselves for the trial of this cause. The element of time alone precluded them.

A careful study of the record in this case will reveal to any legal mind that the attorneys representing the petitioners were only half-heartedly going through the empty form of a trial and were not in truth and in fact attempting to protect the rights of these defendants.

In the case of *Powell v. Alabama, supra,* this Court used the following language:

> " * * * In a capital case, where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, it is the duty of the court, whether requested or not, to assign counsel for him as a necessary requisite of due process of law; *and that duty is not discharged by an assignment at such a time or under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case.* To hold otherwise would be to ignore the fundamental postu-

late, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard.' *Holden v. Hardy,* 169 U. S. 366, 42 L. Ed. 780, 18 S. Ct. 383, supra." (Italics ours.)

See also *People v. Winchester,* 352 Ill. 237, 245, 185 N. E. 580.

In view of the foregoing facts and authorities we submit that due process of law was denied these petitioners in that they were denied the aid of counsel.

POINT III.

PETITIONERS WERE DENIED DUE PROCESS OF LAW IN THAT THE TRIAL COURT POSSESSED NO JURISDICTION TO ENTER JUDGMENT.

In the case of *Powell v. Alabama, supra,* this court said:

"It never has been doubted by this court, or any other so far as we know, that notice and hearing are preliminary steps *essential to the passing of an enforceable judgment,* and that they, together with a legally competent tribunal having jurisdiction of the case, constitute basic elements of the constitutional requirement of due process of law." (Italics ours.)

We have demonstrated in the two preceding points that one of the preliminary steps essential to an enforceable judgment is lacking in this cause in the denial

of counsel, and further, that the right of petitioners to a fair and impartial trail was violated by the State through its agents, in the procurement and use of extorted statements to obtain a conviction.

Certainly since deliberate fraud on the part of the State has been shown, resulting in the denial of fundamental rights to these petitioners, it must be conceded that petitioners were not accorded due process of law within the meaning of the Federal Constitution.

In view of the conduct of this cause, from its inception, the trial court was without authority to enter a binding judgment and its attempt so to do was a denial of due process of law. In this conection, we quote again from the case of *Powell v. Alabama, supra,* where this court employed the following language:

> "Mr. Justice Field, in an earlier case, *Galpin v. Page,* 18 Wall. 350, 368, 21 L. Ed. 959, 963, 964, said that the rule that no one shall be personally bound until he has had his day in court was as old as the law, and it meant that he must be cited to appear and afforded an opportunity to be heard. 'Judgment without such citation and opportunity wants all the attributes of a judicial determination; it is judicial usurpation and oppression, and never can be upheld where justice is justly administered.' "

Again, as to the denial of a constitutional right of petitioners and as to its result and effect as to the validity of the hearing and the judgment of the court thereon, we refer this Court to the case of Nielsen, 131 U. S. 176, 33 L. Ed. 118, wherein it was said:

"In other words, a constitutional immunity of the defendant was violated by the second trial and judgment. *It is difficult to see why a conviction and punishment under an unconstitutional law is more violative of a person's constitutional rights, than an unconstitutional conviction and punishment under a valid law.* In the first case, it is true, the court has no authority to take cognizance of the case; but, in the other, *it has no authority to render judgment against the defendant.* This was the case in Ex parte Lange where the court had authority to hear and determine the cause, but we held that it had no authority to give the judgment it did. It was the same in the case of Snow; the court had authority over the case, but we held that it had no authority to give judgment against the prisoner. He was protected by a constitutional provision, securing to him a fundamental right. It was not a case of mere error in law, but a case of denying to a person a constitutional right. And where such a case appears on the record, the party is entitled to be discharged from imprisonment." (Italics ours.)

See also In re Bonner, 151 U. S. 242, 38 L. Ed. 149.

In addition to this, we have called the attention of the Court, supra, to the fact that the judgment herein is supported solely upon illegal evidence. On this point, the Oklahoma Court, in *McRae v. State,* 8 Okla. CR. 483, after quoting the due process clause from the Fourteenth Amendment said:

"Under this provision no state or court has the right to deprive any person of life, liberty or property except in a lawful manner and upon lawful evidence. It is true that the admission of illegal testimony does not necessarily deprive a defendant of due process of law, because the other testimony in a case might show that it did not affect the results; but where illegal evidence is admitted which is material in its character and which goes directly to the question at issue, and where the record shows that such evidence reasonably contributed to a verdict of guilty, then such a conviction cannot be said to have been obtained by due process of law. This is the condition of the record now before us. The hearsay evidence admitted was material and directly involved the pivotal points in the case, and without this testimony the jury might well have returned a verdict of acquittal. We cannot, therefore, say that the introduction of this evidence was harmless error." Quoting from the syllabi.

In the case of *Twining v. New Jersey*, 211 U.S. 78, 53 L. Ed. 97, this Court declined to hold that forcing a defendant to make a certain statement was in itself a denial of due process of law where the Constitution and Statutes of a state did not provide immunity from self-incrimination. The Court said:

"Salutary as the principle (protection against self-incrimination) may seem to the great majority, it cannot be ranked with the right to hearing before condemnation, the immunity from arbitrary power not acting by general laws . . . . . It has no

place in the jurisprudence of civilized and free countries outside the domain of the common law, and it is nowhere observed among our own people in the search for truth outside the administartion of the law. *It should, must, and will be rigidly observed where it is* secured by specific constitutional safeguards." (Italics ours.)

Justice Grifith, in this cause, ... Miss....., 161 So. 470 (R. 173) as to the entering of the judgment herein by the Supreme Court of Mississippi said:

"The Scottsboro cases are models of correct constitutional procedure as compared with this now before the Court. In fundamental respects, it is no better than the case reviewed in *Moore v. Dempsey*, 261 U. S. 86, 67 L. Ed. 543, wherein the formal court procedure was without defect, but the judgment was vitiated by the substance of what actually lay behind it.

"It may be that in a rarely occasional case which arouses the flaming indignation of a whole community, as was the case here, we shall continue yet for a long time to have outbreaks of the mob or resorts to its methods. But if mobs and mob methods must be, it would be better that their existence and their methods shall be kept wholly separate from the courts; that there shall be no blending of the devices of the mob and of the proceedings of the courts; that what the mob has so nearly completed let them finish, and that no court shall be adoption give legitimacy to any of the works of the

mob, nor cover by the frills and furbelows of a pretended legal trial the body of that which in fact is the product of the mob, and then by closing the eyes to actualities, complacently adjudicate that the law of the land has been observed and preserved.

Anderson, J., concurs in this dissent."

Therefore there is no doubt but what petitioners rights to due process of law were denied by the entry of judgment by the trial court and its affirmance by the appellate court.

POINT IV.

PETITIONERS WERE DENIED DUE PROCESS OF LAW IN THAT THEY WERE DENIED EQUAL PROTECTION OF THE LAW.

Petitioners filed a motion for a new trial and in arrest of judgment (R. 141) in the Superme Court of Mississippi on the theory that no opportunity had been afforded for filing same in the lower court. The motion and affidavits in support thereof revealed that immediately after the jury found these petitioners guilty, the trial judge thereupon consulted a calendar and sentenced them at night after which they were carried to a jail in an adjoining county, and that early the next morning, the Court adjourned for the term.

Under Mississippi practice, every person is given the right to make a motion for a new trial; but according to the circumstances in this case, petitioners were deprived of this right. Had the opportunity been afforded, and had counsel appointed by the court taken advantage

thereof, the technicality on which the Supreme Court relied in affirming the case, on original appeal, would probably have been swept away.

While the right of making motion for a new trial is not essential to due process of law, yet if this privilege be allowed to some persons and not to all persons similarly situated, such deprivation of the right to make the motion is equivalent to denial of due process of law, for due process of law and the equal protection of the laws are secured only when—

> "* * * the laws operate on all alike and do not subject the individual to an arbitrary exercise of the powers of the government." *Duncan v. Missouri,* 152 U. S. 377, at page 382.

In the case of *Yick Wo v. Hopkins,* 118 U. S. 356, 30 L. Ed. 220, this Court used the following language, which appears to be applicable here:

> "Though the law itself be fair on its face and impartial in appearance, yet, if it is applied and administered by public authority with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. This principle of interpretation has been sanctioned by this court in *Henderson v. Mayor, etc. of New York,* 92 U. S. 259 (Bk. 23, L. Ed. 543); *Chy Luny v. Freeman,* 92 U. S. 275 (Bk. 23 L. Ed. 550); *Ex parte Va.* 100 U. S. 339 (Bk. 25

L. Ed. 676); *Neal v. Delaware*, 103 U. S. 370 (Bk. 26, L. Ed. 267); and *Soon Hing v. Crowley* (*supra*)."

In the case of *State v. Guerringer*, 265 Mo. 408, 178 S. W. 65, the Supreme Court of Missouri held that where sufficient time was not allowed in which to make a motion for a new trail, the accused was denied due process of law. In this case the jury returned a verdict of guilty in a capital case fifteen minutes before midnight on the last night of the term. The law required that a motion for a new trial be made before the end of the term. The Court held in this case that the failure of the defendant to have a like opportunity with others similarly situated to have a sufficient time to make a motion for a new trail constituted a denial of due process and such denial required a new trial.

In its opinion the Court said in the above case:

> "Moreover, the Constitution guarantees to defendant that he shall not be deprived of his property, or his liberty, or his life without due process of law. If he had no opportunity to file a motion for a new trial, as we must concede he did not have, but notwithstanding that his life be taken, it will have been taken without due process of law."

For the errors of the trial court in failing to control its sittings and adjournments so as to afford petitioners a like opportunity with others similarly situated, to make a motion for a new trial, we think reversal must follow:

> "Surely it is better that justice travel with a leaden foot, rather than that she should walk rough-

shod over the constitutional rights of citizens, to be equal one with another before the law." *State v. Gaerringer, supra.*

POINT V.

THE DECISION OF THE SUPREME COURT OF MISSISSIPPI IS ITSELF A DENIAL OF DUE PROCESS OF LAW.

In the case of *Snyder v. Mass.*, 291 U. S. 97, 78 L. Ed. 674, the Supreme Court of the United States defined the limits within which a State may regulate the procedure of its courts in consonance with due process of law as required by the Fourteenth Amendment to the Federal Constitution. In this case this court used the following language in this connection:

> "The Commonwealth of Massachusetts is free to regulate the procedure of its courts in accordance with its own conception of policy and fairness unless in so doing it offends some principles of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental. *Twining v. New Jersey*, 211 U. S. 78, 106, 111, 112; *Rogers v. Peck*, 199 U. S. 425, 434; *Maxwell v. Dow*, 176 U. S. 581, 604; *Hurtado v. California*, 110 U. S. 516; *Frank v. Mangum*, 237 U. S. 309, 326; *Powell v. Alabama*, 287 U. S. 45, 67."

In the instant case, the Supreme Court of Mississippi attempts to defeat the right of petitioners, defendants in the trial court, to a fair and impartial trial, and this by a mere rule of procedure.

Why are these negroes sentenced to hang? Surely not for the murder of Raymond Stewart, for there is no competent evidence in the record against them on which a conviction for this crime could be based, but simply because their attorneys (who were appointed by the Court) failed to object to the extorted confessions in the proper form of words at precisely the proper stage of the proceedings. The Supreme Court of Mississippi based its affirmance of this case on the original appeal on the fact that counsel for petitioners did not move to exclude the admittedly incompetent confessions after their introduction.

Can this error in procedure of indifferent counsel prejudice the substantial rights of these petitioners who, despite the fact they were ignorant, illiterate "cornfield" negroes took the stand (and not having legal training or being cognizant of technical rules of procedure) with all the earnestness of their souls, did all in their power to object and to move to exclude the illegal and incompetent? And all the time, the negroes were moving to exclude in the only way they knew how, their bodies were also pleading (the marks of the rope and lash were visible to all who gazed upon them) to the Court not to allow these purported confessions, so brutally extorted to be used against them.

But counsel contends that when the facts as to the involuntary nature of the confessions became so plain as no longer to be denied that then the duty devolved upon petitioners to move to exclude the testimony, or else they were helpless to protect themselves from the obvious fraud. This seems to us to be quibbling of the

utmost insincerity. The whole defense in this case was based upon a denial of the legality of these confessions. The means by which they were extorted were laid bare before the Court and jury in all their hideousness. They were repeatedly objected to, but no precise motion to exclude was made. However, no one could have been deceived as to the wishes of the petitioners with respect to these so-called confessions. Yet the Supreme Court of Mississippi attempts to defeat the right of petitioners to a fair and impartial trial and this by a mere rule of procedure. A conviction thus obtained by illegal evidence is no triumph for justice and does not tend to uphold the majesty of the law.

In its Opinion on Suggestion of Error, in this cause (R. 166), the Supreme Court of Mississippi admits the illegality of the so-called confessions, under the Constitution of the State of Mississippi, in that they were forced self-incrimination. (R. 168); the court expresses its horror of the manner in which the statements were extorted (R. 173), but in spite of these facts the court rules that because no motion to exclude was made by petitioners after it became apparent that said statements had been extorted by violence, that petitioners waived all right to charge the admission of said evidence as error, both under the Constitution of the State of Mississippi, and the due process clause of the Fourteenth Amendment to the Federal Constitution. (R. 168-169.)

In view of the settled law that waiver is the deliberate abandonment of a known right; in view of the further fact that petitioners objected to the so-called confessions, when they were first introduced, on the

ground that they were not free and voluntary (R. 35, 41); that the whole defense was predicated upon a denial of the truth of said statements, and an exposition of the shameful and hideous manner in which they were extorted, it is inconceivable to us that the doctrine of waiver is here correctly applied.

Further than this, such waiver, if attempted, would be void as against public policy. Under the law petitioners could not waive their objection to the use by the state of deliberate fraud. *Coppell v. Hall,* 7 Wall, 542, 19 U. S. (L. Ed.) 244; *Motor Contract Co. v. Van Der Volgen,* 162 Wash. 449, 298 Pac. 705, 79 A. L. R. 39.

And certainly they could not waive their objection to a fraud which, on their trial, denied to them fundamental rights, and thus secured their conviction and sentence of death.

But sweeping all argument as to waiver aside, the State of Mississippi, in its destruction of petitioners' fundamental rights, likewise destroyed the validity of the trial. *Mooney v. Holohan, supra,* and *In re Nielsen, supra.* Because of the fraud of the State the binding effect of the whole proceeding against these petitioners was totally vitiated and destroyed; and under the circumstances the waiver of petitioners, if it can properly be said that there was one, was of no more effect than the illegal and void proceedings which occured prior thereto.

We submit, therefore, that it is apparent that any rule of procedure adopted by the Supreme Court of Mississippi, which serves as a device by which the court

may ignore the denial in the lower court of those fundamentals essential to due process of law, is so arbitrary and unjustifiable a denial of essential justice, as to be within itself a denial of due process of law. And especially does this seem true in that the error in procedure was committed by counsel appointed by the court at a time, and under circumstances, which made adequate representation impossible. *Klatsky v. Hatch,* 157 N. Y. S. 878.

CONCLUSION

We conclude therefore, with deference, that under the facts and the law as hereinbefore set out that petitioners have been deprived of their right to due process of law within the meaning of the Fourteenth Amendment to the Constitution of the United States on their trial in the Circuit Court of Kemper County and on their appeal to the Supreme Court of the State of Mississippi, and we respectfully ask that the judgment of the Supreme Court of Mississippi be reversed.

Respectfully submitted,

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Three weeks service and filing of this brief is hereby expressly waived. This the 28th day of December, 1935.

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